No. 13-18-00486-CV

IN THE THIRTEENTH COURT OF APPEALS

CALHOUN PORT AUTHORITY,
Defendant/Appellant,

v.

VICTORIA ADVOCATE PUBLISHING CO.,
Plaintiff/Appellee.

Appealed from 135th District Court
Calhoun County, Texas
Cause No. 2018-CV-3354-DC
Hon. Robert E. Bell

BRIEF OF PLAINTIFF/APPELLEE VICTORIA ADVOCATE PUBLISHING CO.

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Statement Regarding Oral Argument

The Advocate opposes oral argument for two reasons: (1) in this case arising primarily under the Texas Open Meetings Act ("TOMA"), it believes the public will be best served by a speedy decision, which oral argument will only tend to delay; and (2) the Advocate believes the issues are straightforward enough that the Court will not benefit appreciably from hearing argument.

Issues Presented

Reply to Issue No. 1: The Advocate's claims regarding the meeting of May 9 (that the notice for the closed session violated TOMA with respect to the discussion about hiring Mr. Farenthold, as did that part of the closed session) and the Advocate's requests for relief (declaration of the illegalities, and the voiding of Mr. Farenthold's hiring) are neither moot nor non-justiciable.

Reply to Issue No. 2: The Advocate's prayer for an injunction to prevent future TOMA violations presents a justiciable issue.

Reply to Issue No. 3: The Advocate's prayer for publication of the certified agenda of the May 9 closed session, and its claims regarding the inadequacy of the certified agendas, present justiciable issues.

Reply to Issue No. 4: Relief under the Uniform Declaratory Judgment Act ("UDJA") is not entirely redundant of relief under TOMA.

Statement of the Facts[1]

A. The CPA's Hiring of Blake Farenthold

On April 6 (all dates are 2018, unless noted otherwise), Blake Farenthold resigned from representing Texas District 27 in the U.S. House of Representatives, amidst reporting by national, state, and local news media

> that a sexual harassment lawsuit against his office and involving allegations against him *(Greene v. Office of Representative Blake Farenthold,* No. 1:l4-cv-02110-RC (D.D.C., filed Dec. 14, 2014)) was settled in 2015 for $84,000. It was further reported, in December 2017, that the settlement was paid from public funds provided by taxpayers, and that Mr. Farenthold had not reimbursed, with his own money, the source of the public funds. Following that revelation, Mr. Farenthold promised to pay the money back to the taxpayers. Instead, on April 6, he abruptly resigned before the end of his term, on the eve of the House Ethics Committee's report on his conduct. That committee had investigated his use of public funds to pay the plaintiff in *Greene,* and had called upon him to repay the taxpayers. When he resigned in April, Speaker of the House Paul Ryan said that Mr. Farenthold had "reiterated" his promise to pay back the funds, and that the Speaker expected Mr. Farenthold to "follow through."

(3CR 678.)

Ten days later, on April 16, Mr. Farenthold was in touch by text message

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[1] Though the Advocate agrees with much of the CPA's Statement of the Facts, there are occasions when it veers away from the facts and into an argumentative spin on the facts, or glosses over important facts. Since "[i]n a civil case, the court will accept as true the facts stated unless another party contradicts them," TEX. R. APP. P. 38.1(g), the Advocate provides its own Statement.

The facts as stated here are based primarily on the pleadings, and evidence in the record that is relevant to the correct resolution of the CPA's plea, consistently with the discussion in the Standard of Review, *infra*.

with Randy L. Boyd, chair of the CPA's board of commissioners. (1CR 114.[2]) By April 19, Mr. Farenthold was awaiting an employment contract from Charles Hausmann, the CPA's port director, i.e., its chief executive. (1CR 106.) Also on April 19, one of the CPA's attorneys emailed a draft contract to Mr. Hausmann, and asked Mr. Hausmann to "[p]lease advise when you want us to send it to the board for review." (1CR 103-04.) On the same day, Mr. Hausmann forwarded the draft to Mr. Farenthold with the caveat "[i]t has not been approved by the Board." (1CR 103.) On May 3, Mr. Hausmann made it even clearer to Mr. Farenthold: "Our attorney spoke yesterday. The employment contract [for Mr. Farenthold to serve as the CPA's legislative liaison] has to be approved by the Board. The next Board Meeting is on May 9th." (1CR 111.)

According to Mr. Boyd's deposition testimony, the hiring of Mr. Farenthold was "the first time that the port was hiring a full-time legislative liaison." (2CR 599:16-18.) Under the draft contract, Mr. Farenthold had the following duties:

> • Developing and guiding CPA's public policy agenda, including goals, objectives, strategies, tactics, programs and/or projects in accordance with CPA' s priorities, including driving CPA's messages to the U.S. Army Corps of Engineers, members of government, media and the public.
>
> • Conducting research and drafting analyses of legislation and

[2] The CPA "is governed by a board of six commissioners." TEX. SPECIAL DISTRICT LOCAL LAWS CODE § 5003.051.

regulations to inform policy position and priorities that impact CPA.

• Providing advice and developing effective strategies and tactics for leadership in response to time sensitive political and public policy issues. Articulate positions for the Board of Directors to consider for policy statements, legislative response letters, briefs, fact sheets, talking points, and at meetings.

• Identifying, monitoring and analyzing relevant policy trends and issues.

• Increasing CPA's presence and visibility in Washington, D.C., with legislators, the U.S. Army Corps of Engineers, the Executive Branch, and other key targets, along with working collaboratively with others to further CPA"s policy agenda and to obtain public funding.

• Coordinating activities with the U.S. Army Corps of Engineers, including obtaining direction on attainment of identified goals and policy recommendations on developing issues.

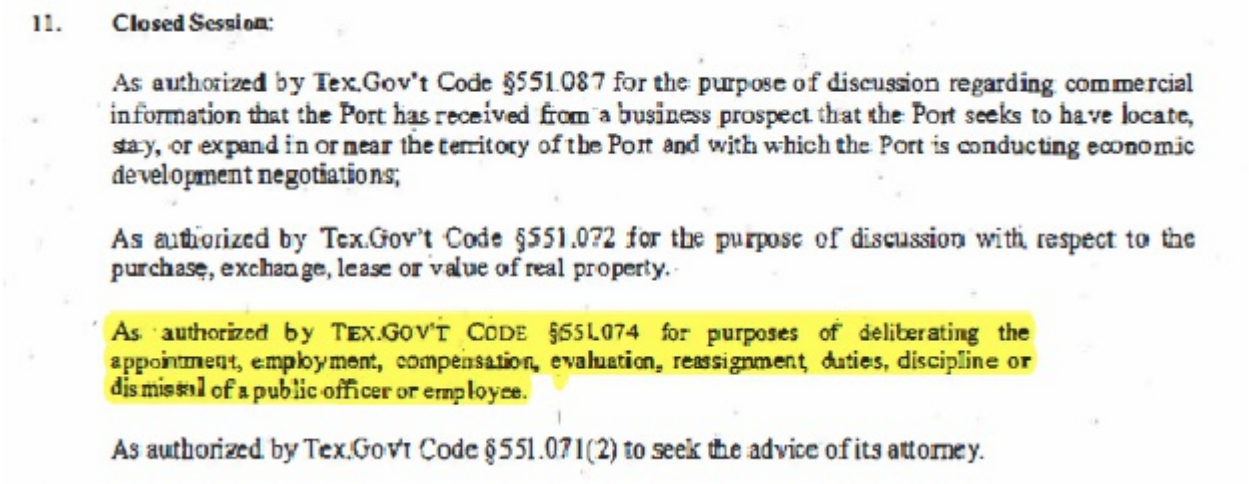
• Ensuring the timely and accurate filing of all required reports in compliance with federal lobby laws and the Ethics Reform Act.

• Submitting weekly written reports of activities to the Port Director.

• Performing other duties as assigned.

(1CR 92-93.) The salary was to be $150,000 per year. (1CR 93.)

In advance of the May 9 meeting, the CPA issued a meeting notice, which advised there would be a closed session to discuss four items, the third of which was (and there is no dispute that it was) for deliberation of the employment of Mr. Farenthold, even though the notice made no mention of him, or the position he was to fill, or the salary he was to be paid:



11. **Closed Session:**

As authorized by Tex.Gov't Code §551.087 for the purpose of discussion regarding commercial information that the Port has received from a business prospect that the Port seeks to have locate, stay, or expand in or near the territory of the Port and with which the Port is conducting economic development negotiations;

As authorized by Tex.Gov't Code §551.072 for the purpose of discussion with respect to the purchase, exchange, lease or value of real property.

As authorized by TEX.GOV'T CODE §651.074 for purposes of deliberating the appointment, employment, compensation, evaluation, reassignment, duties, discipline or dismissal of a public officer or employee.

As authorized by Tex.Gov't Code §551.071(2) to seek the advice of its attorney.

(1CR 11.[3])

The record does not presently contain evidence of what occurred during the closed session concerning Mr. Farenthold,[4] but according to the meeting minutes:

[3] The highlighted text reads: "As authorized by TEX.GOV'T CODE §651.074 [should be § 551.074] for purposes of deliberating the appointment, employment, compensation, evaluation, reassignment, duties, discipline or dismissal of a public officer or employee."

[4] "A governmental body shall either keep a certified agenda or make a recording of the proceedings of each closed meeting, except for a private consultation [with an attorney] permitted under Section 551.071." TEX. GOV'T CODE § 551.103(a). Though the meeting record may not be admitted into a court record except upon entry of a final judgment, *id.* at § 551.104(b)(2), the trial court has in its possession a copy of the certified agenda. (1CR 284.) That document has not been shared with the Advocate.

Agenda Item No. 12: Return to OPEN SESSION and take any action deemed necessary based upon discussion in closed meeting.

The Board adjourned the Closed Session at 10:49 a.m. Board Chair Randy L. Boyd announced that "No action or consensus had been taken in closed session".

Board Chair Randy L. Boyd directed the Port Director to proceed with hiring the person discussed in Closed Session.

(1CR 202.[5]) It is undisputed that at some later point the hiring occurred, and that the terms generally tracked the draft contract, but with Mr. Farenthold's salary at $160,000 instead of $150,000, and elimination of his requirement to submit weekly activity reports in writing to Mr. Hausmann. Mr. Boyd acknowledged that Mr. Farenthold's salary is comparable, at the CPA, only to that of Mr. Hausmann. (2CR 599:5-15.) There is no evidence in the record that the CPA publicly announced the hiring until it issued a press release on May 14. (CPA Brief 3.)

B. Reaction to the Hiring

The Advocate sued the CPA on May 21 for declaratory and injunctive relief on the ground that the notice was insufficient for what the CPA intended to discuss in closed session regarding Mr. Farenthold. It alleged that the notice

> violated TEX. GOV'T CODE § 551.041, and rendered the hiring of Mr. Farenthold reversible or voidable by injunction under §§ 551.141, and -.142. The Court should also declare that the [CPA] violated the

[5] The highlighted text reads: "Board Chair Randy L. Boyd directed the Port Director to proceed with hiring the person discussed in Closed Session."

> Open Meetings Act by deliberating during that meeting regarding Mr. Farenthold. Any closed deliberation of the hiring of Mr. Farenthold that occurred without public notice is a per se and unlawful closed session, and the Court should declare that the "certified agenda" of this deliberation be made public.

(1CR 9.) The CPA, having been made aware by the Advocate's counsel that the lawsuit was coming, issued a notice on the same day (May 21) for a special meeting on May 24. The meeting was to include, in open session, "[d]iscuss[ing] and tak[ing] any action necessary on amending the District's Employee Policy and Procedure Manual" (1CR 20[6]), and the following in closed session:

> As authorized by Tex.Gov't Code §551.074 for purposes of deliberating the appointment, employment, compensation, evaluation, reassignment, duties, discipline or dismissal of a public officer or employee, more specifically, Employee Position: Legislative Liaison, Blake Farenthold

(1CR 20.)

According to the minutes of the May 24 meeting, the action taken on amending the manual was as follows:

[6] As the Court knows from the CPA's Brief, the CPA contends that the manual implicitly delegated to the port director the CPA's authority to hire and fire employees. (CPA Brief 2.)

Agenda Item No. 4: Discuss and take any action necessary on amending the District's Employee Policy and Procedure Manual.

Pursuant to further review and discussion, a motion was made by Board Member J. C. Melcher, Jr. to amend the Employee Policy and Procedure Manual to state that the hiring of the person filling the position of the legislative liaison must be approved by Board action. The motion was seconded by Board Member Tony Holladay and the motion carried with Board Members J. C. Melcher, Jr., Tony Holladay, Aron Luna and H. C. Wehmeyer, Jr. voting for the motion and Board Members Randy L. Boyd and Dell R. Weathersby voting against the motion.

(4CR 894.[7]) After approving the amendment, the board voted to a deadlock, 3-3, on a motion to terminate Mr. Farenthold:

Pursuant to further review and discussion, a motion was made by Board Member J. C. Melcher, Jr. to terminate Blake Farenthold in the position of the Legislative Liaison. The motion was seconded by Board Member Tony Holladay. Board Members J. C. Melcher, Tony Holladay and Aron Luna voted in favor of the motion and Board Members Randy Boyd, H. C. Wehmeyer, Jr. and Dell Weathersby voted against the motion. The motion failed with a 3-3 tie and Mr. Blake Farenthold remains in the position of Legislative Liaison.

(4CR 895.[8])

After May 24, in the proceedings below, the CPA filed a special exception (original and amended, 1CR 30 and 1CR 174, respectively), sought protection from discovery (1CR 63[9]), sought a continuance of the trial date (1CR 168),

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[7] The highlighted text reads: "to amend the Employee Policy and Procedure Manual to state that the hiring of the person filling the position of the legislative liaison must be approved by Board action."

[8] The highlighted text reads: Pursuant to further review and discussion, a motion was made by Board Member J. C. Melcher, Jr. to terminate Blake Farenthold in the position of the Legislative Liaison. The motion failed with a 3-3 tie and Mr. Blake Farenthold remains in the position of Legislative Liaison."

[9] This Court denied mandamus of the trial court's overruling of the CPA's (continued...)

moved for summary judgment (original and amended, 2CR 393 and 4CR 794), and filed a plea to the jurisdiction (original and amended, 2CR 309 and 3CR 686). After the original plea was heard on August 24, and pending a ruling from the trial court, the Advocate filed its final amended petition. (3CR 675.) The trial court denied the CPA's plea on August 29 (3CR 685), then the CPA filed an amended plea to address the final amendments. (3CR 686.) The trial court denied the amended plea in the appealed-from order. (4CR 1081.) The CPA's appeal on September 5 continued the trial, which was scheduled to start on September 10. It is not disputed that Mr. Farenthold remains to this day the CPA's legislative liaison, at the rate of $160,000 per year.[10]

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[9](...continued)
motion for protective order. *In re Calhoun Port Authority*, No. 13-18-00405-CV (Tex. App.–Corpus Christi July 26, 2018) (mem.).

[10] Contemporaneously with this Brief, the Advocate has filed its Emergency Motion for Temporary Orders, asking the Court to stay the payments to Mr. Farenthold pending further orders of this Court.

Summary of the Argument

The trial court, and this Court, may not resolve fact issues relevant to both justiciability and the merits of the case. Nonetheless, many of the CPA's arguments implicitly require the Court to make such an error—to resolve whether the CPA took any action that was illegal under TOMA—because that is the only way these argument can prevail.

The CPA's other arguments are equally defective. In contending that mootness precludes deciding whether the notice of the May 9 closed session violated TOMA with respect to the discussion about hiring Mr. Farenthold, the CPA completely ignores a 2017 precedent from this Court under which that issue is clearly not moot, and cites instead a case from Fort Worth that is distinguishable. In contending the Advocate is not entitled to relief in the form of an injunction because it has not alleged a pattern of TOMA violations, the CPA ignores that the Advocate has alleged two notice violations and two record-keeping violations. In contending the Advocate is not entitled to an order requiring publication of the May 9 certified agenda, its legal analysis fails to cite any supporting case law, and ignores the plain language of the TEXAS GOVERNMENT CODE. In contending that the Advocate is not entitled to judgment declaring the May 9 and May 24 certified agendas are inadequate, the CPA

wrongly argues as if the Advocate claims they do not exist. And in arguing that relief under the UDJA is barred because it is entirely redundant of relief under TOMA, the CPA ignores the possibility that attorney's fees may be awardable under the UDJA, but not under TOMA.

Argument

A. Overview of the Claims

The CPA argued below, and argues on appeal, that all of the Advocate's claims are either not justiciable or have become moot, so the Advocate's entire case must be dismissed for lack of subject-matter jurisdiction. (3CR 686-88; CPA Brief 36.) Hence, the Advocate begins with an overview of its claims, and the relief it seeks:

- For the May 9 meeting, the CPA's notice of the closed session concerning the employment of Mr. Farenthold was inadequately descriptive, in violation of TEX. GOV'T CODE § 551.041,[11] in light of *Cox Enters., Inc. v. Bd. of Trs. of the Austin ISD ,* 706 S.W.2d 956 (Tex. 1986).[12] (3CR 678-79 at ¶ 10.) Hence, the closed session was

[11] "A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body."

[12] "The Board did not provide full and adequate notice [of a closed session], particularly where the subject slated for discussion was one of special interest to (continued...)

illegal. (*Id.* at 679 at ¶ 11.) For these violations, the Advocate seeks a declaratory judgment. (3CR 683 at ¶ 1.)

- The board's directive to Mr. Hausmann "to proceed with hiring the person discussed in Closed Session" (1CR 202), resulting directly from the illegal closed session, was a voidable action (3CR 679 at ¶ 11). The Advocate prays that the district court "[i]ssu[e] an injunction that reverses, or voids, the hiring of Mr. Farenthold." (3CR 683 at ¶ 2.)
- The CPA board did not delegate "unfettered and exclusive authority to hire and fire employees" such as Mr. Farenthold. (3CR 680 at ¶ 12.) The Advocate prays for a declaratory judgment to that effect. (*Id.*)
- The CPA violated TEX. GOV'T CODE § 551.103 by failing to prepare an adequate certified agenda or to make a recording of the closed sessions on May 9 and May 24 concerning Mr. Farenthold. (3CR 680-81 at ¶¶ 13-14.) The Advocate prays for appropriate declaratory relief (*id.*), and orders that the CPA make public the May 9 certified agenda (3CR 679 at ¶ 11), as well as the May 24 certified agenda

[12](...continued)
the public." *Id.* at 959.

(3CR 681 at ¶ 14).

- For the May 24 meeting, the notice ("[d]iscuss and take any action necessary on amending the District's Employee Policy and Procedure Manual" (1CR 20)) was inadequately descriptive, in violation of TEX. GOV'T CODE § 551.041 and in light of *Cox*, of the board's intent to discuss "removal of any authority from its Port Director regarding hiring Mr. Farenthold" (3CR 681 at ¶ 14).
- "[E]ntering injunctive relief to prevent future violations of the Open Meetings Act." (3CR 683 at ¶ 2.)
- "Awarding ... the costs of this action, together with reasonable attorney's fees for trial and appeal." (3CR 683 at ¶ 3.)

B. <u>The Standard of Review</u>

"Whether a court has subject matter jurisdiction is a question of law" and is, as such, reviewed *de novo*. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 & 228 (Tex. 2004). But the Texas Supreme Court has recognized what is, for this case, a significant limitation on the ability of the courts at all levels to resolve jurisdictional issues before trial:

> [I]f a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. When the consideration of a trial court's subject

> matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await fuller development of the case, mindful that this determination must be made as soon as practicable. Then, in a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists.... *If the evidence creates a fact regarding a jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder.* However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.
>
> We acknowledge that this standard generally mirrors that of a summary judgment ....
>
> ....
>
> ... When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor....

Miranda, 133 S.W.3d at 227-28 (citations omitted; emphasis added).

The Advocate will show that the CPA's arguments about non-justiciability were properly rejected by the trial court, and must be rejected also on appeal, because on this Court's *de novo* review it will be apparent that (1) they implicate a key factual question on the merits, i.e., whether the CPA took any illegal action that a court can remedy by voiding it, (2) the key factual question is genuinely

disputed,[13] and so (3) it must be decided by the fact-finder, not by a judge. The CPA has some other arguments (e.g., mootness) that do not exhibit the same problem, but they are equally unavailing on *de novo* review.

C. The Issues on Appeal

Reply to Issue No. 1: The Advocate's claims regarding the meeting of May 9 (that the notice for the closed session violated the Texas Open Meetings Act ("TOMA") with respect to the discussion about hiring Mr. Farenthold, as did that part of the closed session) and the Advocate's requests for relief (declaration of the illegalities, and the voiding of Mr. Farenthold's hiring) are neither moot nor non-justiciable.

1. Mootness Does not Preclude a Declaration that the Notice for the May 9 Closed Session was Illegally Inadequate, and that the Closed Session was Itself Illegal

The Advocate's first, and principal, claim is that the notice of the May 9 meeting's closed session concerning the employment of Mr. Farenthold was inadequate, in violation of TEX. GOV'T CODE § 551.041,[14] as interpreted by *Cox*.[15] (3CR 678-79 at ¶ 10.) Hence, the closed-session consultation itself was illegal.

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[13] The CPA's statement of the standard (CPA Brief 8-9) disregards *Miranda*'s significant limitation, because the CPA ignores the evidence that contradicts its contention that its board took action at the May 9 meeting.

[14] "A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body."

[15] "The Board did not provide full and adequate notice [of a closed session], particularly where the subject slated for discussion was one of special interest to the public." *Id.* at 959.

(*Id.* at 679 at ¶ 11.) For these violations, the Advocate seeks a declaratory judgment. (3CR 683 at ¶ 1.)

There is no doubt this is, on its face, a legally viable claim: (1) TEX. GOV'T CODE § 551.041 requires prior public notice,[16] and (2) the Supreme Court in *Cox* made completely clear that the notice requirement applies to closed sessions, and must be satisfied by tailoring the notice to the public interest in the topic to be deliberated in closed session. 706 S.W.2d at 959. The only question to be resolved in connection with the first claim is one the CPA's appeal does not pose: whether the CPA's notice satisfied § 551.041 in light of *Cox*. If on remand the trial court (or jury) determines the notice was not adequate, then the Advocate will become entitled to what the *Cox* plaintiffs got from the Supreme Court—a declaration of unlawfulness—plus the possibility of an award of attorney's fees (3CR 683 at ¶ 3).

This is sufficient to defeat mootness, as this Court recently made clear in *Lugo v. Donna ISD Bd. of Trs*., 557 S.W.3d 93, 96-97 (Tex. App.–Corpus Christi 2017). Lugo alleged that in violation of TOMA, proper notice did not precede the trustees' vote to appoint replacements for two trustees who had resigned, and sought "a declaratory judgment that the appointments ... were void." *Id.* at 95.

[16] "A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body."

The trial court ruled against Lugo, but by the time this Court got the case, the two appointees had resigned, so the defendant argued that the dispute had become moot. *Id.* at 96. At that point, there were no appointments to void; further, the defendant argued, there was no possibility of injunctive relief against future violations, so declaratory relief was all that remained, and that was insufficient to stave off mootness. *Id.* This Court disagreed: "Lugo's remaining interest in obtaining attorney's fees if he were to prevail ... prevents it from being moot." *Id.* at 97. The Court noted that fees would be awardable under both TOMA and the UDJA. *Id.* at 97. Here, the Advocate specifically invoked the UDJA with respect to its request for a declaration that the May 9 notice was "without [the] legally adequate notice" required by TOMA (3CR 683 at ¶ 1), so as in *Lugo* fees are awardable under both statutes.

The CPA inexplicably ignores *Lugo* (a binding authority in this Court), mentions the Advocate's claim for attorney's fees *nowhere* in its brief, and then proclaims that the Advocate's principal claim is moot: "Regardless of whether the notice of the May 9 Meeting was adequate ..., any putative problem was cured by the Board's action taken at the May 24 Special Meeting. (CPA Brief 24.) The CPA cites *Meeker v. Tarrant County Coll. Dist.*, 317 S.W.3d 754 (Tex. App.–Fort Worth 2010, pet. denied), where the plaintiffs claimed the defendant gave

inadequate notice of closed-session deliberations for one meeting in 2007 and two meetings in 2008. Pursuant to the deliberations, the defendant entered into new employment contracts (one in 2007, and one in 2008) with a certain de la Garza as the college's chancellor. *Id.* at 757-58. The plaintiffs sought declarations that the meeting notices were unlawful and that both contracts (including the 2008 contract, which was in effect when the plaintiffs sued) were void; they also sought an injunction ordering the defendant not to pay or recognize Mr. de la Garza as its chancellor, and attorney's fees. *Id.* at 758. The trial court ruled for the defendant on cross-motions for summary judgment. *Id.*

While the case was on appeal, the defendant and Mr. de la Garza in 2009 signed a new contract, one that "facilitated de la Garza's departure as [the defendant's] chancellor." *Id.* As a result of that post-trial development, the plaintiffs' requests for injunctive relief became moot: even if there had been violations, all of the proposed injunctive relief related to Mr. de la Garza as the chancellor, and he was no longer the chancellor. *Id.* at 760. The court also, however, ruled that mootness had overtaken the request for declarations that the 2007 and 2008 meeting notices were unlawful, and that the 2007 and 2008 contracts were void. The court's reasoning was that the *only possible effect* of declaring that the 2007 and 2008 notices were unlawful was to void the 2007 and

2008 employment contracts, but these had already been rendered moot by the 2009 separation contract: "[D]eclaring that the 2007 and 2008 meeting-agenda notices violated TOMA cannot have any practical legal effect on a currently-existing controversy because the declarations would only void contracts that have previously been superseded." *Id.* at 761.

The court acknowledged that Meeker had a claim for attorney's fees, *id.* at 760-61, but held that TOMA authorizes fees only for obtaining mandamus or injunctive relief, not declaratory relief, and Meeker's "pleadings do not request attorney's fees under [the UDJA]." *Id.* at 762. But even if *Meeker* is correct that TOMA does not authorize fees for declaratory relief, and this Court's *Lugo* opinion is wrong on that point, this case is still distinct from *Meeker* because it *does* invoke the UDJA. Furthermore, for the reasons explained in the following section, more relief than attorney's fees flows from the illegality of the May 9 notice and closed session: that illegality also serves as the springboard for the Advocate's second claim, which is that Mr. Farenthold's hiring is voidable, and should be voided.[17]

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[17] It also serves as the springboard for the Advocate's prayer for injunctive relief in the form of an order requiring the CPA to make public the May 9 certified agenda (3CR 679 at ¶ 11), as discussed in the Reply to Issue No. 3. *See*, *e.g.*, *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 470 (Tex. App.-Dallas 2007, no pet.) ("Ramos's request for a declaration that appellants violated the statute,

(continued...)

2. Furthermore, the Claim that Mr. Farenthold's Hiring is Voidable is Justiciable, and His Hiring is Voidable

The CPA contends that voiding Mr. Farenthold's hiring does not present a justiciable dispute for two reasons: (a) the board took no action with respect to hiring him, so there is nothing to void (CPA Brief 10-14); and (b) even if it did take action, such action is irrelevant because "hir[ing] Mr. Farenthold was entirely within the Port Director's [Mr. Hausmann's] discretion" (CPA Brief 15-21). Both of those reasons involve the key merits question of whether the CPA took any action that can be voided, which *Miranda* prohibited the trial court form resolving on its own.

Alternatively—if the board did take an action on May 9 that was not within the port director's independent authority—then the CPA argues that the board's do-over on May 24 mooted any claim about the board's action on May 9.[18]

We address each of these arguments below.

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[17](...continued)
coupled with the potential remedy involving [public release of] the certified agenda, establishes that this issue is not moot" even though the governmental body repealed the ordinance that it had enacted in violation of TOMA).

[18] This mootness argument about the board's *action* overlaps with, but is distinct from, the CPA's previously-discussed argument that what happened on May 24 mooted any claim about the adequacy of the *notice* for the May 9 meeting.

a. There is a Genuine Dispute about Whether the Board Acted with Respect to Hiring Mr. Farenthold

TOMA allows deliberations and non-final actions during closed sessions. TEX. GOV'T CODE § 551.103(c)(1) & (2). "A *final* action, decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter." TEX. GOV'T CODE § 551.102 (emphasis added). Binding authority establishes this Court's power to void final actions, decisions, or votes made in open sessions based on discussions that occurred during inadequately-noticed closed sessions. *Pt. Isabel ISD v. Hinojosa*, 797 S.W.2d 176, 182-83 (Tex. App.–Corpus Christi 1990, writ denied).[19]

In *Pt. Isabel*, "the Board initially met in executive session. During the public meeting immediately thereafter, the Board filled the position of principal" at three schools, as well as five lower-level positions. 797 S.W.2d at 179. This Court held the notice for the executive session was inadequate with respect to deliberation about the principals, but not with respect to deliberation about the lower-level employees. *Id.* at 180-82. The Court proceeded to consider whether

[19] *See also Swate v. Medina Comm. Hosp.*, 966 S.W.2d 693, 699 (Tex. App.– San Antonio 1998, pet denied) ("[a]ssuming, without deciding, that the notices did not comply with the Texas Open Meetings Act as a matter of law, any actions taken by the Board in violation of the Texas Open Meetings Act would be voidable as a consequence").

the trial court correctly voided the hiring of all principals and lower-level employees, or should have voided only the hiring of the principals. The Court reasoned that "defective notice of a meeting renders voidable only those specific actions which are in violation of the [Open Meetings] Act." *Id.* at 182-83. Hence, the trial court should have voided only the hiring of the principals (the notice was inadequate only as to that deliberation), not all the hiring. *Id.* at 183-84.

Pursuant to *Pt. Isabel*, the board's hiring of Mr. Farenthold is voidable, and should be voided. The CPA tries to escape this outcome not by arguing that the notice was adequate—that issue was not in its plea, and is not in this appeal—but by arguing that the board did not make a final decision after the closed session to hire Mr. Farenthold. The CPA's argument takes the Court into a a genuine dispute about a factual matter, and that dispute precludes the Court from agreeing with the CPA. On the Advocate's side, the CPA's own minutes state the following:

> Agenda Item No. 12; Return to OPEN SESSION and take any action deemed necessary based upon discussion in closed meeting.
>
> The Board adjourned the Closed Session at 10:49 a.m. Board Chair Randy L. Boyd announced that "No action or consensus had been taken in closed session".
>
> Board Chair Randy L. Boyd directed the Port Director to proceed with hiring the person discussed in Closed Session.

(1CR 202; *see supra* note 5.) We also know that before the May 9 meeting, Mr.

Hausmann indicated the board needed to approve Mr. Farenthold's employment contract. On April 19, one of the CPA's attorneys emailed a draft employment contract to Mr. Hausmann, and asked Mr. Hausmann to "[p]lease advise when you want us to send it to the board for review." (1CR 103-04.) On the same day, Mr. Hausmann forwarded the draft to Mr. Farenthold with the caveat "[i]t has not been approved by the Board." (1CR 103.) On May 3, Mr. Hausmann made it even clearer to Mr. Farenthold: "Our attorney spoke yesterday. The employment contract has to be approved by the Board. The next Board Meeting is on May 9th." (1CR 111.) A fact-finder could reasonably infer from these facts that *the board's* final action was Mr. Boyd's "direct[ing] the Port Director to proceed" with hiring Mr. Farenthold. Pursuant to *Pt. Isabel*, that final action is voidable, and should be voided.

All the CPA can do at this stage is dispute this reasonable interpretation of the facts. According to its spin on the minutes, when Mr. Boyd "directed the Port Director to proceed with hiring," all he really meant was Mr. Hausmann "had consulted with the Board and could proceed with his plan to hire Mr. Farenthold." (CPA Brief 13.) But the notice for the May 9 closed session said nothing about a mere consultation to determine the best qualified candidate,[20] and, in any event,

[20] According to the employment manual on which the CPA relies so heavily, (continued...)

there was no reason for Mr. Hausmann to consult with the board on the best-qualified applicant because Mr. Farenthold was the only applicant. The CPA also cites the fact that its board voted on May 24 to "amend" its employment manual to give itself authority over "the hiring" of anyone as legislative liaison (4CR 894), which it would not have done if it had already believed it had such authority. (CPA Brief 18.) But a fact-finder could conclude the board did so merely to bolster its position that the board did not decide to hire Mr. Farenthold on May 9, and could discount it for that reason.

Hence, there is a dispute about whether the board took a voidable action as a result of the closed session, which precludes (under *Miranda*) the Court from holding that there is no possible remedy here, and consequently no jurisdiction.

b. There is a Genuine Dispute About Whether Mr. Hausmann had Authority to Act Independently of the Board

The CPA's alternative argument is that even if the board took a voidable action by directing Mr. Hausmann to hire Mr. Farenthold, that fact is irrelevant because Mr. Hausmann had the authority to do so on his own. But even if we assume the CPA correctly interprets its Employee Policy and Procedure Manual to

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[20](...continued)
the only stated purpose of the consultation is to determine the best-qualified applicant. (3CR 737.)

mean that "the Port Director makes the determination of who to hire" (CPA Brief 16), the facts discussed in the preceding section reasonably support the conclusion that in light of the extraordinary nature of Mr. Farenthold's employment (the novelty of having a full-time legislative liaison (2CR 599:16-18), the breadth of his duties (1CR 92-93), and the amount of his salary (2CR 599:5:15)), the board decided *it* would be the decisionmaker on this issue, not Mr. Hausmann. Hence, the Court is once again faced with a factual dispute that it cannot resolve on this appeal.

i. The CPA's Authorities Do Not Negate the Genuine Dispute on this Issue

The CPA cites two authorities in support of its argument that there is no *material* factual dispute, but neither is on point. In *Spiller v. Tex. Dep't of Ins.*, 949 S.W.2d 548 (Tex. App.–Austin 1997, pet. denied), the commissioner of the Department of Insurance implemented a reduction in force, and some of the terminated employees sued to have the reduction declared void. Their argument was that the department's governing body, the State Board of Insurance, considered the reduction in a closed meeting that had been inadequately noticed. *Id.* at 550. The trial court agreed about the inadequacy, and the defendant did not appeal that finding. *Id.* at 551. But the trial court declined to void the reduction, and the appeals court affirmed. There was conflicting evidence about whether the

board, at the problematic meeting, approved the commissioner's plan for the reduction, or merely had the opportunity to "raise any questions or objections" to it. *Id.* at 550. The uncertainty was irrelevant because the then-existing Insurance Code plainly gave the *commissioner*, not the *board*, authority to decide on a reduction in force. *Id.* at 551. Here, in contrast, no statute gives the CPA's port director any authority, independent of the board, over employment decisions; the only statutory grant of authority over any decision is to the CPA's board (*see supra* note 2). Thus, it was entirely within the board's authority to delegate hiring and firing authority in general to the port director, but also to decide that it, as an exception, would decide the question of Mr. Farenthold's employment at $160,000 per year as legislative liaison; what can be delegated can be undelegated. That interpretation is more consistent with the facts (i.e., the pre-meeting references to approval by the board and Mr. Boyd's directive to Mr. Hausmann after the closed session) than the CPA's argument for Mr. Hausmann's unfettered authority.

The CPA's second authority, *Swate v. Medina Comm. Hosp.*, 966 S.W.2d 693 (Tex. App.– San Antonio 1998, pet denied), is distinguishable for the same reason. Swate challenged his termination by arguing that the hospital's board made the decision—and communicated the decision to the hospital's administration, one of whose officials communicated it to Swate—in a way that

violated TOMA (specifically, by taking "a 'straw vote' or 'secret ballot'" during a closed session, *id.* at 696). The trial and appellate courts refused to void the termination. According to the appellate court, "the Board did not have authority to hire and fire hospital personnel," *id.* at 698, and "Arnold held the independent power to hire and fire hospital personnel, *id.* at 699. Here, again, the CPA's board is the only entity with statutory authority (*see supra* note 2), and even if it delegated to the port director that authority over employment matters in general, the evidence here is consistent with the factual conclusion that it chose to exercise that authority on its own with respect to hiring Mr. Farenthold.

ii. There Is, In Any Event, a Genuine Dispute About the Degree of Authority Delegated to the Port Director

Earlier, for the sake of argument, we assumed the CPA correctly interprets its Employee Policy and Procedure Manual to mean that "the Port Director makes the determination of who to hire." (CPA Brief 16.) But that interpretation is legitimately debatable, and its debatability further supports the conclusion that there is a factual dispute about whether Mr. Hausmann had authority to act independently of the board in hiring Mr. Farenthold.

As previously noted, the Legislature's statutory grant of all authority concerning the CPA is to the CPA's board, not to any employee (*see supra* note

2). The employment manual nowhere explicitly delegates that authority. Instead, it provides that "[t]he Port Director shall consult with the Commissioners before determining which applicant best qualifies for the position" (4CR 903), but that is only a delegation of the determination of the best qualified applicant. It is in no way a delegation of what was at issue here: the creation of a new position (since it is undisputed that the CPA had never before employed a full-time legislative liaison (2CR 599:16-18)), at a salary comparable, within the CPA, only to that of Mr. Hausmann (2CR 599:5-15), and exercising an extraordinarily broad scope of duties (1CR 92-93). As of the May 9 meeting, the manual did not delegate the degree of authority that the CPA wishes the Court to believe.[21]

c. The Board's Action at the May 24 Meeting Does Not Moot the Voidability of the Hiring

We have already explained why the dispute over the inadequacy of the May 9 *notice* was not mooted by events at the May 24 meeting (*see supra* pages 15-19).

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[21] The Advocate's petition includes a request for a "declaratory judgment" concerning the scope of the delegation as of May 9, as expressed (or, in reality, *not* expressed) in the manual and in the board's meeting minutes. The Advocate agrees with the CPA that the purpose of examining the delegation is to determine whether the board acted, which is essential to determine whether Mr. Farenthold's hiring can be voided. (CPA Brief 34.) Hence, the delegation must be resolved for the purpose of the TOMA claim, and the Advocate agrees that its dispute with the CPA over the delegation is not justiciable under either TOMA or the UDJA if the Court first determines *for another reason* that the voidability of Mr. Farenthold's hiring is not a justiciable issue. (*See also* Reply to Issue No. 4, *infra*.)

A separate question is whether the dispute over the voidability of the *hiring* of Mr. Farenthold, pursuant to the board's directive after the inadequately noticed May 9 meeting, was mooted by events at the May 24 meeting. The CPA contends that it was (CPA Brief 21-25), but it was not.

The Advocate does not dispute the principle that "[a] governmental body that has violated the Open Meetings Act may meet again in a proceeding that complies with the Open Meetings Act and reauthorize actions that it previously authorized at the invalid meeting." *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 283 (Tex. App.–Dallas 1991, writ denied). The problem is that the CPA did not reauthorize what it previously authorized. What it previously authorized (on May 9) was hiring Mr. Farenthold into a new position at the CPA. What it did on May 24 was fail to terminate him by a tied vote of 3-3:

> Pursuant to further review and discussion, a motion was made by Board Member J. C. Melcher, Jr. to terminate Blake Farenthold in the position of the Legislative Liaison. The motion was seconded by Board Member Tony Holladay. Board Members J. C. Melcher, Tony Holladay and Aron Luna voted in favor of the motion and Board Members Randy Boyd, H. C. Wehmeyer, Jr. and Dell Weathersby voted against the motion. The motion failed with a 3-3 tie and Mr. Blake Farenthold remains in the position of Legislative Liaison.

(4CR 895; *see supra* note 8.)

The CPA contends that the phrasing of the motion was sensible because the board considered Mr. Fahrenthold already an employee. (CPA Brief 22 n.44.) That is beside the point, the point being that *reauthorization* moots a dispute over

voidability, not action on a different motion. And the motion was different, because the lack of a majority to terminate Mr. Farenthold is not the same as a majority to hire him. If the tied vote shows anything with respect to hiring, it is that only three commissioners would have voted to hire on May 24, and that would not have been sufficient to reauthorize the voidable hiring of May 9.

3. Conclusion to Issue No. 1

Mootness has not vitiated the Advocate's claim that the CPA's notice for the May 9 closed session violated TOMA with respect to the discussion about hiring Mr. Farenthold, even if the Advocate is not entitled to any other relief. And, in fact, it may be entitled to other relief: a fact-finder must resolve on remand whether the CPA board took action to hire Mr. Farenthold. Whether it did so is a key question on the merits, and it is subject to genuine dispute, so *Miranda* precluded the trial court, and precludes this Court, from resolving it; that will be the job of the fact-finder. Finally, the CPA board's vote at the May 24 meeting did not ratify or reauthorize the board's action on May 9 to hire Mr. Farenthold (assuming a fact-finder decides it did act on May 9), so the Advocate's claim about that action is not moot.

Reply to Issue No. 2: The Advocate's prayer for an injunction to prevent future TOMA violations presents a justiciable issue.

1. Whether Injunctive Relief is Warranted Does Not Present an Issue of Justiciability

The Advocate prays for "injunctive relief to prevent future violations of the Open Meetings Act." (3CR 683 at ¶ 2.) This is a form of relief that the law plainly allows: "An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, *prevent*, or reverse a violation or threatened violation of this chapter by members of a governmental body." TEX. GOV'T CODE § 551.142(a) (emphasis added).

The CPA contends that the pleadings and evidence do not warrant an injunction against future violations (CPA Brief 25), but that is a question for the trial court to decide, within the scope of its discretion for awarding equitable relief, after it *hears* the evidence. When justiciability depends on relief, it involves a different question: whether there is *any possible relief*.[22] Clearly, the district court can grant the injunction for which the Advocate prays; the CPA may dispute whether the evidence warrants such an injunction, but that is not a dispute about justiciability. Indeed, none of the cases the CPA cites in its argument on

[22] *The State Bar of Texas v. Gomez*, 891 S.W.2d 243, 246 (Tex. 1994) ("[b]ecause the district court cannot effect a remedy that would resolve this dispute, this case does not present a justiciable controversy").

this issue holds, or even suggests, that a question about whether a trial court should award an injunction against future violations—something that is indubitably within the trial court's power under § 551.142(a)—is a question about justiciability.[23]

The Court may note, however, that the CPA has never conceded the Advocate's claim about inadequacy of the May 9 notice: it steadfastly maintains it was adequate (CPA Brief 10), and it has written that the specificity of the May 24 notice (with respect to the second deliberation about Mr. Farenthold) was simply "an effort to placate" the Advocate (2CR 321 & 3CR 703). The Advocate has also claimed that the May 24 notice was inadequate with respect to amending the CPA's employment manual. The notice merely stated the board would "[d]iscuss and take any action necessary on amending the District's Employee Policy and Procedure Manual" (1CR 20), but the Advocate alleges it should have specified

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[23] The CPA cites the following inapposite cases under TOMA:

- *Harris County Emerg. Serv. Dist. No. 1 v. Harris County Emerg. Corps.*, 999 S.W.2d 163, 171 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (affirming an injunction based on three notice violations; justiciability was not at issue).
- *Rubalcaba v. Raymondville ISD,* 2016 WL 1274486, at *2 (Tex. App.–Corpus Christi March 31, 2016, no pet.) ("Rubalcaba did not seek injunctive relief," so justiciability involving the availability of injunctive relief was not at issue).
- *Foreman v. Whitty*, 392 S.W.3d 265, 279 (Tex. App.–San Antonio 2012) (finding that plaintiff failed to prove *any* violation, so no injunction was warranted; justiciability not at issue).

the discussion and action would focus on the board's responsibility for hiring the legislative liaison: the notice "did not let the public know that it was contemplating its removal of any authority from its Port Director regarding Mr. Farenthold" (3CR 681 at ¶ 14). (The CPA argues that the Advocate asserts the May 24 inadequacy "without any supporting allegations or explanation" (CPA Brief 27), but that is plainly false.)

The Advocate has also alleged that the certified agendas of both the May 9 and May 24 closed sessions are inadequate to satisfy the intent of TEX. GOV'T CODE § 551.103. (3CR 680-81 at ¶¶ 13-14.[24])

Hence, the Advocate has alleged, and may yet prove, four violations: two notice violations, and two record-keeping violations. In *Cox*, the court of appeals noted that the plaintiff received only declaratory relief because, in the trial court, the defendant committed to change its behavior: "The [trial] court denied the [plaintiff] newspaper's prayer for an injunction on the [defendant's] assurance that it would not commit further violations of the [Open Meetings] Act as finally interpreted by the courts." *Bd. of Trs. of the Austin ISD v. Cox Enters., Inc.,* 679 S.W.2d 86, 88 (Tex. App.–Texarkana 1984), *aff'd in part*, 706 S.W.2d 956 (Tex.

[24] Tex. Att'y Gen. Op. No. JM-840, at 7 (1988) ("[e]nough detail should be included to enable a district judge to determine whether the act has been violated").

1986). The CPA has never made a similar assurance.

2. Conclusion to Issue No. 2

In contending that the Advocate's claim for an injunction against future violations does not present a justiciable issue, the CPA asks the Court to prejudge a question about the merits of potential relief as though it were an issue of justiciability. If the Court agrees with the trial court's denial of the plea, and allows the Advocate to prove the TOMA violations it has alleged, it should also allow the trial court to determine whether the requested injunction is appropriate in light of the evidence. It should not use this appeal as an opportunity to preclude the trial court from ordering that form of relief.

Reply to Issue No. 3: The Advocate's prayer for publication of the certified agenda of the May 9 closed session, and its claims regarding the inadequacy of the certified agendas, present justiciable issues.

1. The Agendas are Subject to Publication Because of TEX. GOV'T CODE § 551.101 and § 551.104(b)(3), and the Trial Court may Determine Them to be Inadequate

The Advocate makes two claims about the certified agendas (i.e., the records of the closed sessions on May 9 and May 24): (1) because the notice for the May 9 closed session was inadequate with respect to hiring Mr. Farenthold as legislative liaison, that part of the closed session was illegal, and so the certified agenda of that part should be released to the public (3CR 679 at ¶ 11 & 681 at

¶ 14), and (2) the certified agendas of both closed sessions (on May 9 and May 24) are inadequate, and the trial court should so declare (3CR 681 at ¶ 13).[25]

With respect to the first claim, the law is this:

> If a closed meeting is allowed under this chapter, a governmental body may not conduct the closed meeting unless a quorum of the governmental body first convenes in an open meeting *for which notice has been given as provided by this chapter* and during which the presiding officer publicly:
>
> (1) announces that a closed meeting will be held, and
>
> (2) identifies the section or sections of this chapter under which the closed meeting is held.

TEX. GOV'T CODE § 551.101 (emphasis added). Of course, this requirement must be read in light of *Cox*'s requirement for a notice tailored to the general public's special interest in the closed-session topic. What the statute says in plain terms is that absent an adequate notice, there can be no lawful closed session.

Because the Advocate may prevail on its claim about the adequacy of the May 9 notice, then § 551.101 requires the conclusion that the CPA board could not conduct the closed session on May 9 regarding Mr. Farenthold: that

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[25] The CPA seems to think the Advocate's claim is that the May 9 certified agenda "does not exist." (CPA Brief 29.) On the contrary, the Advocate's claim is that both are inadequate, which is readily apparent from the Advocate's petition: "When the Court compares the certified agendas of these two meetings, in camera, it may find that Defendant's description of the proceedings are terse and similar, despite the fact that the two closed sessions were obviously much different." (3CR 681 at ¶ 13.)

deliberation had to occur in an open session. And because it had to occur in an open session, the certified agenda (as it pertains to the deliberation about Mr. Farenthold) may be released to the public under § 551.104(b)(3):

> (b) In litigation in a district court involving an alleged violation of this chapter, the court:
>
> ....
>
> (3) may grant legal or equitable relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or recording *of any part of a meeting that was required to be open under this chapter*.

(Emphasis added.)

The CPA argument (CPA Brief 28-31) focuses on the suitability of the deliberation regarding Mr. Farenthold for a closed session. The Advocate does not disagree that adequately-noticed personnel matters may be suitable for closed sessions. But suitability is not enough: there must also be adequate notice, and here there was not. The CPA simply ignores that aspect of the law, without any case law in support. Hence, release of the May 9 certified agenda is relief the trial court may order, and the dispute over that relief is justiciable.

Regarding the Advocate's second claim about the certified agendas (inadequacy[26]) (3CR 680-81 at ¶¶ 13-14), and prayer for a declaration to that

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[26] Tex. Att'y Gen. Op. No. JM-840, at 7 (1988) (TEX. GOV'T CODE (continued...)

effect, those are matters for the trial court to determine once it reviews both certified agendas (as previously noted, it already has the May 9 certified agenda (*see supra* note 4)). Such relief is clearly possible, so the dispute is clearly justiciable.

2. Conclusion to Issue No. 3

The Advocate's prayer for publication of the portion of the certified agenda pertaining to the closed-session discussion of hiring Mr. Farenthold presents a justiciable issue: if the Advocate proves on remand that the notice was inadequate under TOMA, it will follow that the session should not have been held, and the trial court may order the certified agenda to be made public. The Advocate has also stated justiciable claims regarding the adequacy of the certified agendas.

Reply to Issue No. 4: Relief under the UDJA is not entirely redundant of relief under TOMA.

1. Attorney's Fees May be Awardable Under the UDJA, but not Under TOMA

The Advocate's petition seeks declaratory relief, once citing the UDJA specifically,[27] but otherwise not indicating whether the relief should be issued

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[26](...continued)
§ 551.103 requires "[e]nough detail should be included to enable a district judge to determine whether the act has been violated").

[27] 3CR 683 at ¶ 1: requested relief to include "entering declaratory judgment (continued...)

under the UDJA, TOMA, or both.[28] The prayer for relief is broad enough to allow for entry under both, as it requests "such other relief, legal or equitable, as may be warranted to effectuate the letter and purpose of the Open Meetings Act." (3CR 683 at ¶ 4.)

This Court has consistently entertained cases brought under both statutes, without delineating what parts—the claims, the injunctive relief, the declaratory relief, the attorney's fees—should be litigated under which statutes.[29] The Supreme Court in *Cox* described that case as "a declaratory judgment action under the Texas Open Meetings Act," 706 S.W.2d 957, suggesting that the declaration was entered under TOMA, not the UDJA (which was never mentioned in the opinion).

With respect to the Advocate's invocation of the UDJA, the CPA makes two arguments, the first being that the UDJA claims are redundant of the TOMA

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[27](...continued)
pursuant to the [UDJA]" that the CPA board "deliberat[ed] and discuss[ed] the hiring of Mr. Farenthold without legally adequate notice."

[28] 3CR 675 at ¶ 1: "seeks declaratory judgment regarding violations of the [Open Meetings] Act"; 3CR 6 at ¶ 12: "seeks declaratory judgment construing the Port's delegation of authority to its Port Director."

[29] *See, e.g., Lugo*, 557 S.W.3d at 97 ("if Lugo is correct that the Trustees violated TOMA, he may be entitled to attorneys' fees under TOMA and the UDJA"); *Pt. Isabel*, 797 S.W.2d at 183 ("[t]he granting of attorney's fees was proper under either" the UDJA or TOMA).

claims, and are non-justiciable for that reason. (CPA Brief 32-34.) This is not true, as is apparent from the discussion, *supra* pages 16-19, of *Lugo* and *Meeker*: Even if declaratory relief is available only under TOMA, and all the Advocate receives is declaratory relief for any of the four violations it has alleged (two notice violations and two record-keeping violations), and *Meeker* is correct that TOMA does not authorize attorney's fees for receiving only declaratory relief, then the Advocate needs the UDJA to support its claim for attorney's fees, and the UDJA does not provide a redundant remedy.

The CPA's second argument is specific to the Advocate's request for a "declaratory judgment construing the Port's delegation of authority [over hiring and firing employees] to its Port Director in its policies and procedures." (3CR 680 at ¶ 12.) Here, again, the CPA claims redundancy (CPA Brief 34), and also argues that the UDJA does not waive sovereign immunity for construing the CPA's employment manual (*id.* at 34-36). The Advocate agrees with the CPA that the purpose of examining the delegation is to determine whether the board acted, which is essential to determine whether Mr. Farenthold's hiring can be voided. (CPA Brief 34.) Hence, the delegation must be resolved for the purpose of the TOMA claim, and the Advocate agrees that its dispute with the CPA over the delegation is not justiciable under either TOMA or the UDJA if the Court first

determines *for another reason* that the voidability of Mr. Farenthold's hiring is not a justiciable issue.

2. Conclusion to Issue No. 4

The Advocate's UDJA claims are not entirely redundant of its claims under TOMA, because fees may be awardable under the former but not the latter. The Advocate concedes that its request for construal of the scope of the CPA board's delegation of hiring/firing authority arises under TOMA in service of its prayer under TOMA for voiding the hiring of Mr. Farenthold.

Conclusion and Prayer for Relief

The Court should affirm the trial court's judgment in all respects.

Date: December 4, 2018

Respectfully submitted,

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Pursuant to TEX. R. APP. P. 9.4(i)(3), I certify that the number of words contained in this computer-generated brief, excluding the portions listed in Rule 9.4(i)(1), but including the highlighted portions of the inserted images, as counted by the word-processing program with which it was prepared (WordPerfect X9), is 9,155.

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Certificate of Service

I certify that the foregoing has been served on Calhoun Port Authority, by electronic service through its counsel of record shown below, on this 4th day of December 2018:

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